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No. 89-7024 (6)

In The

Supreme Court of the United States

October Term, 1990

WARREN McCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

JULIUS L. CHAMBERS, III
RICHARD H. BURR, III
GEORGE H. KENDALL
99 Hudson Street
New York, New York 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square
South
New York, New York 10012
(212) 998-6198

*Attorney of Record

ROBERT H. STROUP
141 Walton Street
Atlanta, Georgia 30303
(404) 522-8500

*JOHN CHARLES BOGER
School of Law, CB #3380
Van Hecke-Wettach Hall
Chapel Hill,
North Carolina 27599
(919) 962-8516

Attorneys for Petitioner
Warren McCleskey

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Should a State, which has been proven (i) to have committed a constitutional violation in a criminal case and (ii) to have deliberately hidden that violation for ten years through a pattern of secrecy and deception, be permitted to assert "abuse of the writ" as a defense to a second federal habeas application – on the ground that the applicant should have discovered the State's misconduct, and its deliberate cover-up, sooner?

2. Should a habeas applicant be deemed to have "deliberately abandoned" a constitutional claim of State misconduct when, after a "reasonably competent" investigation, he was unable to uncover facts either proving the misconduct or revealing the conspiracy by which the State misconduct was being hidden?

3. Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

4. Should a Court of Appeals, in determining whether a State's constitutional violation was harmless error, be permitted under Rule 52(a) of the Fed. R. Civ. P. to disregard the express findings of fact, on the harmless error issue, that were made by the District Court below?

5. Was the State's introduction of an unconstitutionally obtained confession – which was the only item of direct testimony, by an apparently impartial witness, identifying the defendant as the triggerman in a homicide – harmless constitutional error, both as to guilt and as to penalty, in this capital case?

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CITATIONS TO OPINIONS BELOW

An opinion of the District Court granting judgment in petitioner's favor is reported at 580 F. Supp. 338 (N.D. Ga. 1984). The Court of Appeals reversed that judgment at 753 F.2d 877 (11th Cir. 1987) (en banc), and this Court affirmed at 481 U.S. 279 (1987).

On a second federal habeas petition, the District Court entered an order and a formal judgment on January 15, 1988, nunc pro tunc for December 23, 1987, granting petitioner relief; that order, which is not officially reported, appears in the Joint Appendix ("J.A.") at pages 63-100. On January 6, 1989, the District Court entered an order denying respondent's motion to alter or amend the judgment under Rule 60(b); that opinion, also unreported, appears at J.A. 102-111.

A panel of the Court of Appeals reversed the judgment of the District Court and denied relief on November 22, 1989; that opinion, which is reported at 890 F.2d 342 (11th Cir. 1989), appears at J.A. 112-135.

JURISDICTION

A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals on February 6, 1990. See Appendix D to the petition for certiorari. The Court of Appeals stayed its mandate to and including March 23, 1990, pending the timely filing of a petition for certiorari. See Appendix E to the petition for certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2244(b), which provides in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application

> for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> ***Successive petitions***. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Crime

On May 13, 1978, the Dixie Furniture Store in Atlanta, Georgia, was robbed by four men (T. Tr. 360-363), each of them carrying weapons. (T. Tr. 199; 266-268).[1] During the

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[1] Each reference to the transcript of the trial of this case, held in the Superior Court of Fulton County, Georgia, on October 9-12, 1978, will be indicated by the abbreviation "T. Tr.," followed by the number of the page on which the reference may be found. References to the transcript of the state habeas corpus proceedings, held in the Superior Court of Butts County, Georgia, on January 30, 1981, will be indicated by the abbreviation "St. Hab. Tr." References to the transcript of the federal habeas corpus hearing, held in the United States District Court for the Northern District of Georgia on July 8 & 9, and August 10, 1987, will be indicated by the abbreviation "R." followed by numbers indicating the volume of the record and the page number (*e.g.* R4- 1), on which the reference may be found.

robbery, an Atlanta police officer, Frank Schlatt, entered the front of the furniture store in answer to a silent alarm; he was shot and mortally wounded by one of the robbers. (T. Tr. 213; 330-332). Within a month of the crime, three of the four men, including petitioner Warren McCleskey, were taken into police custody. (T. Tr. 349-350; 426-427; see 582). On May 31st, shortly after his May 30th arrest, Mr. McCleskey gave a written statement to police (T. Tr. 178) in which he acknowledged taking part in the robbery but denied shooting Officer Schlatt. (T. Tr. 510-513).

Although several furniture store employees and other persons were present when the robbery began, all had been shunted to offices toward the rear of the store and ordered "to lay down on the floor and close [their] . . . eyes." (T. Tr. 214; 200; 291; 339). Consequently, while some employees testified that they heard footsteps moving forward just before the shots were fired, neither they nor anyone else could tell police which robber had confronted and shot Officer Schlatt. (T. Tr. 200; 214-216; 292-293; 341-343; 330-332). As the District Court subsequently found, "[t]here were no witnesses to the shooting." (J.A. 89).[2]

B. The *Massiah* Violation

After his arrest on May 30th, Mr. McCleskey was placed in solitary confinement at the Fulton County Jail, awaiting trial. The District Court found that approximately one month later, in early July of 1978, officers of the Atlanta Bureau of Police Services colluded with an inmate, Offie Evans – who had just been arrested and taken to the Fulton County Jail on unrelated charges (J.A. 90) – in order to secure a confession that would identify Mr. McCleskey as the robber who had shot Officer Schlatt.

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[2] Police gathered several items of physical evidence which directly tied one or more of the robbers to the crime. For example, co-defendant Ben Wright left a black leather coat which was recovered at the scene. Photographs of the coat were introduced during petitioner's trial. (T. Tr. 370-372; 442-443; 650-654).

The District Court, after three days of evidentiary hearings, found that "one or more of those [who were] investigating Officer Schlatt's murder" (J.A. 90) requested Captain Ulysses Worthy, a supervisory jailor at the Fulton County Jail, to move informant Evans from another cell to the cell adjacent to Mr. McCleskey. (J.A. 82). Next, the officers instructed informant Evans to "get some information" from Mr. McCleskey about Officer Schlatt's homicide (J.A. 78):

> [Evans] was moved, pursuant to a request approved by Worthy, to the adjoining cell for the purpose of gathering incriminating information; Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public; Evans engaged McCleskey in conversation and eavesdropped on McCleskey's conversations with [co-defendant Bernard] DuPree; and Evans reported what he had heard . . . to Assistant District Attorney Parker. . . .

(J.A. 83).

In making these findings, the District Court credited the testimony of jailor Worthy, who recounted how Atlanta police detectives and informant Evans met in Worthy's office at the jail to plan the secret interrogation. Jailor Worthy testified that, during the meeting, Detective Sidney Dorsey (or perhaps another "officer on the case") "asked Mr. Evans to engage in conversations with McCleskey who was being held in the jail." (R5-150). The District Court itself questioned jailor Worthy on the essential points:

THE COURT:	But you're satisfied that those three things happened, that they asked to have him put next to McCleskey, that they asked him to overhear McCleskey, and that they asked him to question McCleskey.
THE WITNESS:	I was asked can – to be placed near McCleskey's cell, I was asked.
THE COURT:	And you're satisfied that Evans was asked to overhear

	McCleskey talk about this case?
THE WITNESS:	Yes, sir.
THE COURT:	And that he was asked to kind of try to draw him out a little bit about it?
THE WITNESS:	Get some information from him.

(R6- 64-65; accord. R6- 26-28).

Jailor Worthy's testimony was buttressed by a remarkable 21-page statement, first given orally by inmate Evans to Atlanta police officials in July of 1978 and later memorialized in writing in August of 1978. (R4- 141-142). In the typewritten statement, Evans described in somewhat rambling detail how he began to question McCleskey about the crime. He bragged that, once in the adjacent cell, he (i) adopted a false name, (ii) claimed a family relationship with McCleskey's co-defendant, Ben Wright, (iii) lied about his own near-involvement in the crime, (iv) spoke to McCleskey about details of the crime which had not been made public and which were known only to Atlanta police and to the participants, (v) established himself with McCleskey as a reliable "insider," and then (vi) began systematically to press McCleskey for information about the crime.[3]

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[3] In his statement, inmate Evans bragged about his duplicity in dealing with Mr. McCleskey:

"I told Warren McClesky [sic] 'I got a nephew man, he in a world of trouble . . . ' McClesky asked me 'What is his name.' I told him 'Ben Wright.' McClesky said 'You Beens' [sic] uncle.' I said 'Yeah.' He said 'What's your name?' I told him that my name was Charles." (Fed. Exh. 8, at 3).

After Evans falsely assured McCleskey that he had seen Wright a few weeks ago, and that he "used to stick up with Ben," (*id.* at 4), Evans told McCleskey that "Ben told me that you shot the man yourself." (*Id.*), Evans then began to pry open the story of the crime. "I said man 'just what's happened over there?' " (*Id.*) After McCleskey told him some details of the crime, Evans continued his surreptitious interrogation: "And

(Continued on following page)

McCleskey's statements to informant Evans later became a centerpiece of the State's case during McCleskey's trial. The State used Evans' testimony to establish three important points: (1) that McCleskey had ostensibly confessed to informant Evans that he shot Officer Schlatt (T. Tr. 870-871); (2) that McCleskey told Evans " . . . he would have tried to shoot his way out . . . if it had been a dozen" police officers (T. Tr. 871);[4] and (3) that McCleskey had clarified to Evans what had become, during trial, a glaring inconsistency in the testimony of another principal State's witness.[5]

After hearing live testimony from jailor Worthy and all of the principal investigating police officers, and after reviewing informant Evans' 21-page statement, the District Court concluded that

> petitioner has clearly established a *Massiah* violation here. It is clear from Evans' written statement that he did much more than merely engage petitioner in conversation about petitioner's crimes

(Continued from previous page)

then I asked McClesky what kind of evidence did they have on him." (*Id.* at 6).

In a subsequent conversation, Evans sought to learn the location of the missing murder weapon: "Then I said, 'They ain't got no guns or nothing man?' " (*Id.* at 7). When Bernard Dupree, Mr. McCleskey's co-defendant, overheard the conversations between Evans and McCleskey from his cell upstairs and became apprehensive, Evans worked to allay Dupree's suspicions, "talking to Dupree about Reidsville [and] just about ma[king] Dupree know me himself." (*Id.* at 9).

[4] This ostensible statement subsequently became a basis for the prosecutor's argument to the jury that Mr. McCleskey had acted with "malice." (*See* T. Tr. 974).

[5] Mamie Thomas – a store employee who said she "never forgets a face" (T. Tr. 303-304) – had told police shortly after the crime that the robber who entered the store from the front door had "rough facial features," a face that was "real bumpy" with a scar. (T. Tr. 301-302). None of these descriptions matched Mr. McCleskey. According to inmate Evans, however, McCleskey had confessed during their jailhouse conversations that he had been wearing makeup and a disguise on the day of the crime (T. Tr. 870-871; 876-879).

> . . . Evans repeatedly lied to petitioner in order to gain his trust and to draw him into incriminating statements. Worthy's testimony establishes that Evans, in eliciting the incriminating statements, was acting as an agent of the state. This case is completely unlike *Kuhlmann v. Wilson* . . . where the Court found no *Massiah* violation because the inmate informant had been a passive listener and had not deliberately elicited incriminating statements from the defendant. Here, Evans was even more active in eliciting incriminating statements than was the informant in *Henry*. The conclusion is inescapable that petitioner's sixth amendment rights, as interpreted in *Massiah*, were violated.

(J.A. 87-88).

C. Petitioner's Efforts To Uncover the Violation

1. Trial Counsel's Requests For Statements

Prior to Mr. McCleskey's 1978 trial, his defense attorney, John Turner, filed a written motion seeking all written or oral statements made by McCleskey to anyone, and all exculpatory evidence. (*See* J.A. 5-8). After an *in camera* inspection of the prosecutor's file, the trial court denied the motion, withholding both (i) the 21-page statement made by informant Evans and (ii) even the fact that the State *possessed* such a statement. (J.A. 9; Fed. Exh. M; R4-73-81; R6-118).

During mid-trial – as the prosecutor began to question Mr. McCleskey about whether he had ever made statements to another jail inmate (J.A. 16; T. Tr. 830) – defense counsel renewed his motion, orally demanding all documents in the State's possession that reflected any statements made by McCleskey. (J.A. 16-17; T. Tr. 830-832). The trial court, which apparently misunderstood the basis for defense counsel's legal contention, again denied the motion. During his colloquy with defense counsel, the trial judge inexplicably furthered the impression that the State possessed no undisclosed written statements at all. (Judge: "I don't know that we

are talking about *any written statements.") (Id.*) (emphasis added).[6]

Defense counsel nonetheless preserved an objection to the court's ruling and briefed the issue on appeal. The Georgia Supreme Court, in denying relief, contributed to defense counsel's misimpression, no doubt unwittingly, when it remarked that "[t]he evidence [that the defense counsel] sought to inspect *was introduced to the jury in its entirety.*" *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146, 150 (1980) (emphasis added).

In sum, both the trial court and the Georgia Supreme Court indicated that the State possessed no writings containing any statements of Mr. McCleskey that had not been disclosed to the defense during trial. Defense counsel subsequently testified that he "was never given any indication that . . . [any undisclosed] statement existed." (J.A. 23-24; St. Hab. Tr. 77).

2. Habeas Counsel's Investigations

Robert Stroup, assisted by lawyers from the NAACP Legal Defense & Educational Fund, Inc., entered Mr. McCleskey's case as a volunteer attorney in April of 1980, shortly before a petition for certiorari was filed on direct

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[6] It appears that the trial court assumed that defense attorney Turner's oral motion was predicated upon Mr. McCleskey's due process right to the disclosure of exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963). The court thus responded to the motion by remarking that the District Attorney "has a statement that was furnished to the Court *but it doesn't help your client.*" (J.A. 17) (emphasis added). The prosecutor, apparently sharing the trial court's misimpression, added that "[i]t's not exculpatory." (*Id.*)

The trial court – also confounded Offie Evans' 21-page written statement with Warren McCleskey's oral statements, made to Evans, that were *contained within* Evans' written statement – then stated: "This is not a statement of the defendant . . . I don't know that we are talking about any written statement." (*Id.*). Defense attorney Turner, however, held fast to his motion, insisting, "I am saying I filed for oral and written statements. I asked for all statements of the defendant." (*Id.* at 18).

appeal.[7] Although Mr. Stroup had nothing more than an unsubstantiated suspicion of a *Massiah* violation – based on Evans' proximity to Mr. McCleskey's cell and Evans' later appearance as the State's witness – Stroup nonetheless decided to include a claim under *Massiah v United States*, 377 U.S. 201 (1964), in his amended state habeas petition, along with twenty-two other constitutional claims. (J.A. 20-22 at § 35; *id.* at 42-47).

Attorney Stroup pursued the *Massiah* claim with a field investigation designed to uncover any facts that might support it. The Fulton County Jail had been staffed in 1978 by several shifts of jailors (R6 76); the total cell population was between 900 and 1700; each shift was staffed by literally scores of officers. (R6 73). Stroup's strategy for locating possible *Massiah* witnesses from among the hundreds of potential witnesses led him first to several Atlanta police officers whom he had represented in unrelated Title VII cases. (J.A. 58). They advised him on the best way to uncover any available evidence of an illegal, jailhouse informant relationship. (J.A. 43-44; R4 31-32). Armed with their advice, Stroup interviewed a number of jailors at the Fulton County Jail "who were directly involved with Offie Gene Evans." (J.A. 59; *id.* at 43-44; R4 33). Stroup testified that "[b]asically, they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives. . . . " (J.A. 45).

Attorney Stroup nonetheless persevered, tracking down a former jail official, Bobby Edwards, to whom he was directed. By early 1981, Mr. Edwards had retired and was living in Helen, Georgia, over 90 miles from Atlanta. (J.A.

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[7] Mr. Stroup testified that, throughout the course of state habeas corpus proceedings, he had responsibility for drafting all pleadings, carrying out investigations, and conducting all hearings. (J.A. 57). Lawyers from the NAACP Legal Defense Fund, while appearing formally on the papers, assumed a back-up role, responding to occasional legal questions from Mr. Stroup and receiving copies of pleadings. (*Id.; see also*, Fed. Exh. 1, Aff't of Boger, at 2 ¶3).

59-60). Through a realtor, Stroup managed to find him and to interview him. Edwards proved to have no knowledge that would support Mr. McCleskey's claim of a *Massiah* violation. (J.A. 60).

Although Mr. Stroup's field investigations on this claim – one of 22 separate constitutional issues which he, as *pro bono* volunteer attorney, was then pursuing –[8] bore no fruit, Mr. Stroup did not abandon the *Massiah* claim at that point. Instead, he sought to discover the prosecutor's file in the case. (J.A. 38; Fed. Exh. 2 at § 20). In response, one of Georgia's Assistant Attorneys General sent him a mass of documents, accompanied by a letter assuring Stroup that Stroup was receiving "*a complete copy of the prosecutor's file* resulting from the criminal prosecution of Warren McCleskey." (J.A. 29-30; Fed. Exh. 7) (emphasis added). Informant Evans' crucial 21-page statement was *not* included among the documents transmitted.[9]

To complete his investigation, Mr. Stroup questioned inmate Offie Evans under oath during state habeas proceedings (St. Hab. Tr. 114-132)[10] and deposed Russell Parker, the

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[8] While investigating Mr. McCleskey's other state habeas claims, Mr. Stroup conducted "more than 30" interviews with other witnesses. (J.A. 32).

[9] Mr. Stroup subsequently averred that, because he relied on these written representations of the State of Georgia, it never occurred to him that this representation was false, that a written statement existed, or that he was being misled. (J.A. 38; Fed Exh. 2, at ¶ 20.). At no time did lawyers for the District Attorney's office or for the Georgia Attorney General's office ever turn over to Mr. McCleskey a copy of Evans' 21-page statement.

[10] Stroup asked Evans when he had been placed in solitary confinement at the Fulton County Jail (St. Hab. Tr. 116), whether there was a "special reason" he had been put into solitary confinement (*id.* 116-117), whether he had been placed adjacent to the cell of Warren McCleskey (id. 117), the identity of the investigators and police officers who had spoken with him, when those conversations with police had occurred (*id.*

(Continued on following page)

Assistant District Attorney who had prosecuted McCleskey. (J.A. 25-28). Mr. Parker denied that the State's relationship with its key witness, Offie Evans, had been improper:

> Q. [Mr. Stroup]: Okay. Were you aware at the time of the trial of any understandings between Evans and any Atlanta police department detectives regarding favorable recommendation [sic] to be made on his federal escape charge if he would cooperate with this matter?
>
> A. [Assistant District Attorney]: No, sir.
>
> Q. Let me ask the question another way to make sure we are clear. Are you today aware of any understanding between any Atlanta police department detectives and Offie Evans?
>
> A. No, sir, I'm not aware of any.

(J.A. 26; Fed. Exh. 3, 9-10).

On cross-examination, the Assistant District Attorney broadened his testimony:

> Q. Do you have any knowledge that Mr. Evans was working as an informant for the Atlanta Police or any police authorities when he was placed in the

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117-118), whether he had been promised anything in exchange for his testimony against Mr. McCleskey (*id.*,122), and whether he had subsequently given testimony against any other inmates in other cases. (*Id.* 126-127). Informant Evans did not disclose that he had been moved from another cell to the cell adjacent to McCleskey's, that he had been asked by Atlanta detectives secretly to interrogate Mr. McCleskey, that he had agreed to do so, or that he had given a 21-page written statement to Atlanta investigators. He did reveal, contrary to his testimony at trial (*see* T. Tr. 868-869; 882), that an Atlanta detective had promised to "speak a word for [him]" with authorities, on Evans' own pending charges, in exchange for his testimony against Mr. McCleskey. (St. Hab. Tr. 122). That admission became the basis for Mr. McCleskey's allegation of a violation of *Giglio v. United States*, 405 U.S. 150 (1972), a claim accepted by the District Court, *see* 580 F. Supp. 338, 380-384 (N.D. Ga. 1984), but later dismissed by the Court of Appeals. *See* 753 F.2d 877, 882-885 (11th Cir. 1987) (en banc).

> Fulton County Jail and when he overheard these conversations of Mr. McCleskey?
>
> A. I don't know of any instance that Offie Evans had worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail.

(J.A. 28; Fed. Exh. 3, 14-15).

Mr. Stroup subsequently testified that, following McCleskey's state habeas proceedings, he concluded that the *Massiah* claim could not be substantiated:

> I looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court.

(J.A. 55; R4- 44-45).

3. The Discovery Of The State's Cover-up

Offie Evans's 21-page statement did not come to light until June of 1987 – six years after Mr. McCleskey's initial federal habeas petition had been filed. Its existence was revealed only following a fortuitous development in an unrelated Georgia case.[11] Once the statement was in Mr.

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[11] In that case, *Napper v. Georgia Television Co.*, 257 Ga. 156, 356 S.E.2d 640 (1987), the Supreme Court of Georgia held, for the first time, that police investigative files were within the compass of the Georgia Open Records Act, O.C.G.A. § 50-18-72(a) and were, following of a direct criminal appeal, subject to disclosure during habeas corpus proceedings. Mr. Stroup immediately cited that then-recent decision, still pending before the Georgia Supreme Court on rehearing, in support of a request, made not to the Georgia Attorney General or to the prosecutor, but directly to counsel for the Atlanta Bureau of Police Services, asking for the original police files in Mr. McCleskey's case. (J.A. 35; R1-7-6). Because *Napper* was still pending on rehearing, attorneys for the Atlanta Bureau were reluctant to disclose the entire police file, but on June 10, 1987, they agreed to provide Mr. Stroup with one document – which proved to be the 21-page statement made by Offie Evans. (J.A. 36-37; R1-7-7).

McCleskey's possession, he acted immediately to make it the foundation of a *Massiah* claim which he included in his second federal petition filed in July of 1987. (*See* R1-9 & Exh. E).

Even when presented with Evans' written statement, State officials uniformly continued to deny any illegal conduct.[12] During the hearing on Mr. McCleskey's second federal petition, his attorneys nonetheless sought to develop all of the circumstances under which Evans' statement had been made. Asked by defense counsel *where* the statement had been taken, one of the police officers, Detective Welcome Harris, mentioned "a room [at the Fulton County Jail] that was occupied by a captain, and I don't think – he's no longer employed out there, I think his name is Worthy." (R4 195). Asked whether jailor Worthy had been present during the interview, Detective Harris replied, "No, sir. I'm sure he wasn't, you know." (R4 196).

Despite this denial and Worthy's long retirement from service at the jail, McCleskey's attorneys attempted to locate and subpoena him, as well as many other individuals whose names had surfaced for the first time during the federal hearing. (R4-21). Mr. Worthy's subsequent appearance and his testimony – detailing the secret meeting between informant Evans and Atlanta police officers in which the scheme to violate *Massiah* was developed – came as a complete surprise to both McCleskey's attorneys (R6- 51-53) and Georgia's Assistant Attorneys General. (R6- 5-6).

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[12] Assistant District Attorney Parker testified that he had never met with informant Evans prior to July 12, 1978; that, on that date, Evans volunteered essentially all of the information that was eventually memorialized in Evans' written statement taken on August 1st; and that Parker was unaware of any conversations between Atlanta police officers and Evans on any occasions other than July 12th and August 1st. (R4-140-142; *Id.* 151-153; R5- 78). Other Atlanta police officers consistently denied any prior meetings with informant Evans (R4- 200; R5- 3537) or, in the case of Detective Dorsey, professed not to recall any such meetings. (R5 57-60).

D. The Issue Of Harmless Error

1. The State's Evidence At Trial

As indicated above, there were no eyewitnesses to the shooting of Officer Schlatt, although a number of witnesses identified four robbers, including Warren McCleskey, as participants in the robbery. Several employees testified that they saw Mr. McCleskey enter the furniture store from the front door (T. Tr. 232; *id.* 297-299) while other employees saw his three co-defendants enter from the rear. (T. Tr. 266-267). The four robbers, however, herded all of the employees to several offices in the rear half of the store and forced them to lie face-down on the floor while they carried out the robbery. (T. Tr. 213-214; 267-268; 288-291). This was the state of affairs when Officer Frank Schlatt entered the furniture store by the front door.

No employee was able to testify ~~which~~ of the four robbers confronted Officer Schlatt and fired the shots that killed him. But the State offered two witnesses who told the jury that Warren McCleskey had confessed to the shooting. The first was Ben Wright, one of the robbers. Wright had been a leader in planning and carrying out the robbery; he had directed the other participants (*e.g.*, Tr. T. 654-656) and had led the efforts to obtain the store's receipts from the employees (*e.g.*, T. Tr. 266-267); and he was a likely suspect in the shooting. Wright acknowledged during his trial testimony that the State intended to recommend 20-year concurrent sentences, despite his role in the crime, in exchange for his testimony against Warren McCleskey. (T. Tr. 646-647; 682-683). The District Court later found that Wright's testimony "was obviously impeachable." (J.A. 89).[13]

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[13] Indeed, the District Court noted that there was "some question whether Ben Wright's testimony on the fact of the murder would have been admissible at all" under applicable Georgia evidentiary rules, *see* O.C.G.A. § 24-4-8, "absent corroboration by [informant] Evans' testimony" (J.A. 99 n.8) – although the District Court also noted that the Court of Appeals, on Mr. McCleskey's earlier appeal, had viewed the likely impact of Georgia law differently. (*Id.*)

Just before it retired to deliberate on guilt or innocence, the jury heard another witness, an apparently neutral third party, recount an ostensible jailhouse confession by McCleskey. That witness was Offie Evans. (T. Tr. 865-885).

Apart from the confessions reported by informant Evans and co-defendant Wright, the State's case against Mr. McCleskey *on the murder charge*[14] rested largely upon an effort to place the murder weapon in McCleskey's hand. Both Wright and Wright's girlfriend testified that, on the day of the crime, McCleskey had been carrying a silver .38 pistol linked to the homicide. (T. Tr. 649; 727). Yet on cross-examination, Wright admitted that he, not McCleskey, had personally carried the .38 pistol for weeks at a time prior to the crime. (J.A. 16; T. Tr. 682). Moreover, Wright's girlfriend was confronted, on cross-examination, with evidence that she had informed police, on the day she was arrested, that it was Wright, not McCleskey, who had carried a .38 pistol, while McCleskey "tote[d] a .45." (J.A. 11-14; T. Tr. 631-634).

2. The Issue For The Jury: Malice Murder

At the close of the guilt phase, the Superior Court instructed the jury on theories of malice murder (T. Tr. 998-999) and of felony murder. (T. Tr. 999-1000). The court's instructions indicated that, to find Mr. McCleskey guilty of malice murder, it would have to find that he personally caused the murder of Officer Schlatt or intentionally aided or abetted that crime. In its charge on malice murder, the trial court instructed the jury that "*a person commits murder when he unlawfully and with malice aforethought*, either express or implied, *causes the death* of another human being." (T. Tr. 1000) (emphasis added). In its charge on felony murder, the

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[14] Mr. McCleskey was convicted of two counts of armed robbery – for the Dixie Furniture Store robbery and for another, unrelated robbery – neither of them under challenge here, for which he is presently serving consecutive life sentences. *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146, 147 (1980).

trial court informed the jury that "[t]he homicide is committed in the perpetration of a felony when it is committed *by the accused* while he is engaged in the performance of an act required for the full execution of such a felony" (T. Tr. 1000) (emphasis added), and that the jury should convict "if you believe and find beyond a reasonable doubt that the homicide alleged in this indictment *was caused by the defendant* while he, the said accused, was in the commission of an armed robbery. . . . " (*Id.*).[15]

The jury plainly took the malice murder charge seriously, for during deliberations, it sought further instructions on that issue. The Superior Court repeated the instructions on malice murder set forth above. (T. Tr. 1007-1009). The jury later found Mr. McCleskey guilty of malice murder as well as two counts of armed robbery. (T. Tr. 1010).

II. The Opinions Below

A. The District Court's Ruling

The District Court began its consideration of Mr. McCleskey's *Massiah* claim with an extensive examination of the State's plea of abuse of the writ. At the outset of the July 8, 1987 hearing, the Court invited oral argument from the parties on the issue of abuse (R4- 4-13), then received exhibits and heard live testimony on that issue (R4- 17-52), and finally, engaged in an extensive colloquy with counsel

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[15] The court had earlier charged the jury generally concerning the doctrine of "parties to a crime," as follows:

> That statute says that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime, and then it has several subsections. It says that a person is concerned in the commission of a crime only if he directly commits the crime, intentionally aids or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

(T. Tr. 94).

(R4- 53-120) before satisfying itself that the merits should be entertained.

In its subsequent written order, the District Court made comprehensive findings on the issue of abuse of the writ. The Court first addressed the State's defense of deliberate abandonment:

> [P]etitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts . . . Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." *Fay v. Noia*, 372 U. S. 391, 439 (1963), quoted in *Potts v. Zant*, 638 F.2d 727, 743 (5th Cir. 1981) . . . This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. *Cf. Sanders v. United States*, 373 U.S. 1, 18 (1963).

(J.A. 83-84). Turning to the issue of "inexcusable neglect," the Court followed controlling circuit precedent,[16] reasoning that

> there is . . . no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court [has] concluded . . . [that] counsel's failure to discover Evans' written statement was not inexcusable neglect. [R4- 118-119]. The same is true of

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[16] In *Moore v. Zant*, 824 F.2d 847 (11th Cir. 1987) (en banc), *remanded, Moore v. Zant*, ___ U.S. ___, 109 S.Ct. 1518 (1989), *rev'd on other grounds, Moore v. Zant*, 885 F.2d 1497 (11th Cir. 1989) (en banc), the Eleventh Circuit held that, on the issue of abuse of the writ, a habeas applicant represented by counsel would be chargeable with "counsel's actual awareness of the factual and legal bases of the claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." 824 F.2d at 851.

counsel's failure to discover Worthy's testimony. Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible *Massiah* claim prior to the first federal petition, including interviewing "two or three jailers." . . . The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim. The state argues that petitioner's counsel should have at least interviewed Detectives Harris and Dorsey and Deputy Hamilton. Given that all three denied any knowledge of a request to move Evans next to McCleskey, it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier.

(J.A. 84-85).

The District Court concluded that

> the petitioner's *Massiah* claim as it is currently framed is not an abuse of the writ because . . . it is based on new evidence. Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect.

(J.A. 85).

Turning to the State's defense of harmless error, the District Court made factual findings in support of its conclusion that Offie Evans' "testimony about petitioner's incriminating statements was critical to the state's case," and that the admission of Evans' testimony could not be deemed harmless:

> There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable. . . . Because the

> court cannot say, beyond a reasonable doubt, that the jury would have convicted petitioner without Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.

(J.A. 89-90).

B. The Panel's Ruling

1. Abuse Of The Writ

The panel's opinion began with the express assumption "that McCleskey was unaware of both [informant Evans' 21-page statement and the existence of jailor Worthy]" when he filed his initial federal petition. (J.A 123). Given that assumption, the panel stated, the critical legal question was "whether McCleskey's unawareness of the *factual* bases for his *Massiah* claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim." (*Id.*).

In answering that question, the panel faulted the District Court for "misconstru[ing] the meaning of deliberate abandonment." (J.A. 124). The panel reasoned that since Mr. McCleskey's attorneys had been aware of the *legal* issue, (J.A. 125), it was appropriate to impute to them some unspecified knowledge of the facts as well. The panel concluded that, since counsel "did not accidentally fail to include the *Massiah* claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously" (J.A. 125), the decision not to go forward with the *Massiah* claim in federal court "constitutes prima facie evidence of deliberate abandonment." (*Id*).

> [W]e must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a *Massiah* claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey, but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's *Giglio* claim.

(*Id.*).

The panel also criticized counsel's investigation of the *Massiah* claim as "somewhat lacking." (J.A. 126). The panel specifically faulted counsel: (i) for his failure to have interviewed the two Atlanta detectives or the jailor mentioned by informant Evans (J.A. 126-127 n.12); and (ii) for his failure to have located jailor Worthy earlier. (J.A. 128). The panel dismissed the significance and the utility of Evans' 21-page statement – calling it "[a]t most . . . simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously" (J.A. 128) – and focused instead on the testimony of Worthy, which it called "[t]he key piece of evidence." (J.A. 128). The panel stated that McCleskey's attorneys "ha[d] not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 . . . [or] shown that a more extensive effort at that time . . . would not have turned up Worthy." (J.A. 128).[17]

> A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.

(J.A. 128-129).

The panel made no effort to reconcile its own findings with the District Court's express finding that counsel's investigation had been " 'reasonably competent' " (J.A. 84-85) and that petitioner had not been guilty of inexcusable neglect under the circumstances. (J.A. 85).

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[17] On rehearing, Mr. McCleskey noted for the panel's consideration that jailor Worthy was among literally hundreds of jailors assigned to the Fulton County Jail in 1978. His name surfaced only after Mr. McCleskey's attorneys managed to obtain informant Evans' 21-page statement and were questioning Atlanta Detective Harris about where the statement had been taken. (R4- 195). *See* Suggestion for Rehearing In Banc, dated December 11, 1989, at 21.

2. Harmless Error

In addressing the harmless error issue, the panel did not rely on the factual findings of the District Court, but instead, found that "[t]he officer was killed by the man who entered and secured the front of the store while the other three men were in the back" (J.A. 133) and that "McCleskey was identified by two of the store personnel as the robber who came in the front door." (*Id.*) The panel also found that "the officer was killed by a bullet from a .38 caliber Rossi handgun" (*Id.*) and that McCleskey was tied to the Rossi by the State's evidence. (*Id.*)

Relying on this "substantial amount of circumstantial evidence" (J.A. 132), the panel concluded that the

> evidence other than Evans' testimony presented in the case presents such clear indication of McCleskey's guilt, [that] this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony.

(J.A. 135).

The panel dismissed the effect on Mr. McCleskey's jury of Evans' account of McCleskey's boast – "I would have shot my way out if it had been a dozen police officers" – as "not crucial" to the State's effort to demonstrate that Mr. McCleskey was guilty of murder with malice. (J.A. 134).[18] The panel also dismissed the impact on the jury's verdict of Evans' testimony that McCleskey had confessed to using makeup. Since other witnesses had identified McCleskey as the robber who entered by the front door, the panel reasoned,

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[18] The panel followed an opinion by the Court of Appeals on Mr. McCleskey's first appeal, observing that the prosecutor had advanced two other arguments, in addition to the boast, to support his claim that McCleskey acted with malice. (J.A. 134). The panel also cited the Court of Appeals' earlier observation that the "statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument." (J.A. 134).

the clarification of the discrepancies in the description proffered by a key State eyewitness were " 'relatively unimportant.' " (J.A. 133).

Turning from the guilt-or-innocence verdict to the jury's decision to impose a death sentence, the panel found "no reasonable likelihood" that the jury's decision was affected by Evans' testimony, reasoning that the prosecutor did not introduce Evans as a witness at the sentencing phase or dwell upon his testimony during his closing sentencing argument. (J.A. 134).

SUMMARY OF ARGUMENT

The principal issue on this appeal is whether petitioner Warren McCleskey abused the writ of habeas corpus by omitting a claim under *Massiah v. United States* from his initial federal petition. The District Court found that Mr. McCleskey had not abused the writ, since he could not be charged either with a knowing, "deliberate abandonment" of the claim or with "inexcusable neglect" in failing to find the crucial evidence sooner.

The panel's opinion, which disagrees with those findings, can be read in one of two ways: (i) either it announces a new, "thorough investigation" standard which it proposes to engraft onto the "deliberate bypass" branch of traditional abuse doctrine; or (ii) contrary to Rule 52(a), it substitutes its own factfindings on the reasonableness of counsel's investigation for those of the District Court.

We will show that to accept the former interpretation would require the Court to abandon three hundred years of common law jurisprudence on successive habeas corpus applications and to disregard the plain intention of Congress, presently embodied in 28 U.S.C. §§ 2244 and 2244(b) and Rule 9(b). On the other hand, to accept the latter interpretation would require the Court to repudiate its own prior teachings on the limited role assigned to appellate factfinders by Rule 52(a). Neither consequence is acceptable.

Since at least the Habeas Corpus Act of 1679, English law has permitted habeas applicants to make successive applications without limit. Because adverse adjudications were not *res judicata*, an applicant could go from court to court until he secured his release. Moreover, though adverse rulings could be challenged in successive applications, a decision to *discharge* an applicant could not be appealed. In the late eighteenth and early nineteenth centuries, this English tradition respecting habeas corpus passed into the common law of most American states. Even when some states began to pass statutes restricting this unlimited access to successive applications, they typically allowed such applications when new evidence had come to light.

The common-law tradition pervaded, not only state law, but federal law as well. When this Court first addressed the issue of successive petitions, in *Salinger v. Loisel*, 265 U.S. 224 (1924), and *Wong Doo v. United States*, 265 U.S. 239 (1924), it ratified that tradition, rejecting any strict application of *res judicata* principles and instead asking only whether an applicant brought his successive claims in good faith, without reserving evidence or claims that were "accessible at all times." During the following twenty years, the Court ruled favorably in a number of cases brought by successive applicants. Most clearly, in *Price v. Johnston*, 334 U.S. 266 (1948), the Court refused to deny a habeas applicant, on his fourth federal application, a full opportunity to show that his failure to have asserted a claim earlier might be explained by State misconduct in hiding the relevant evidence.

Congress, which had extended federal habeas protection to state prisoners in 1867, acted in 1948 to codify certain basic procedural rules governing its use. Disclaiming any intention to modify standards that had been established by this Court, Congress rejected a number of proposals that would have sharply curtailed the availability of successive petitions. After the Court decided *Sanders v. United States*, 373 U.S. 1 (1963), outlining the basic framework for analysis of repeater petitions, Congress twice acted to ratify and incorporate the standards of *Sanders*, first in 28 U.S.C. § 2244(b) and then in Rule 9(b). Numerous legislative campaigns either

to outlaw successor petitions or to restrict them dramatically have failed in Congress.

Under *Sanders*, if a State pleads abuse of the writ in response to a habeas application, the applicant must demonstrate that he has not deliberately withheld or bypassed the claim he now asserts, and that he was not "inexcusably neglectful" in failing to identify and assert it earlier. The "deliberate bypass" standard draws its contours from *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); it asks whether an applicant's prior conduct was truly voluntary, knowing and intelligent. If not, then there was no "deliberate bypass." The "inexcusable neglect" branch looks to whether the applicant's actions in previously omitting the claim are so inexcusable that it would be just to charge him with wilful disregard of orderly judicial procedures. *Sanders* also contemplates a third inquiry, asking generally whether the applicant has acted in bad faith, with an intent to "vex, harass, or delay."

The panel's adjudication of Mr. McCleskey's case appears to have added a new "thorough investigation" requirement to the traditional "deliberate bypass" branch of abuse doctrine. Its new rule would charge all habeas applicants, irrespective of good or bad faith, not only with knowledge of evidence "obviously known to them" or "accessible at all times" – indeed, not only with the fruits of a "reasonable investigation" (which the District Court found to have been conducted by Mr. McCleskey's lawyers) – but with all evidence that, in hindsight, might have been developed during a "thorough" investigation.

Such a rule constitutes an utter break with the common-law tradition, with this Court's prior precedents, and with Congressional intent. It substitutes a standard of virtual strict liability for the essentially subjective, good faith test that has traditionally guided federal inquiry in this area. Since federal habeas corpus is a statutory remedy, and since Congress has spoken on the question, no extensive policy discussion is necessary. The panel's decision was beyond its authority to adopt or apply.

Alternatively, if the panel has done nothing more than fault the adequacy of the investigation conducted by

McCleskey's lawyers, it has violated Rule 52(a) and *Amadeo v. Zant*, 486 U.S. 214 (1988). The District Court made fact-findings – both on the adequacy of counsel's investigation and on the accessibility of the newly proffered evidence – which are not clearly erroneous and which, therefore, bind the panel.

Finally, *Sanders* permits the courts to consider the equitable circumstances surrounding Mr. McCleskey's application. McCleskey's own conduct evinces no bad faith at all. He pleaded his *Massiah* claim at the earliest opportunity, based upon no more than a suspicion of governmental misconduct. He conducted a field examination, which he followed up by discovery and direct questioning under oath of a responsible State official. Unable to locate written documents or witnesses to substantiate his serious charge of State misconduct, he decided that the claim was meritless.

The State's conduct, no less than Warren McCleskey's, is subject to equitable scrutiny by a federal habeas court. Judged by equitable standards, the State is responsible for the knowledge and actions of each of its officials, including those State officers who conspired to violate *Massiah* and then deliberately suppressed evidence and lied to cover up their misconduct; and the State must be found guilty of bad faith. Under any of a number of equitable principles – the doctrine of unclean hands, the notion of equitable estoppel, the presumption that arises against one who suppresses or destroys evidence – the State should not be heard, on this record, to assert a defense whose essence is that Mr. McCleskey failed to discover earlier the State's concealment of its own misdeeds.

Finally, the panel held that the State's use of informant Offie Evans' testimony, in violation of *Massiah*, was harmless error, contributing neither to the jury's verdict of guilt nor to its sentence of death. In so holding, the panel plainly disregarded the District Court's findings of fact on important subsidiary issues concerning the weight and significance of the State's other evidence at trial; it thereby violated *Amadeo v. Zant*. Even were the panel free independently to make its own factfindings, it underestimates the importance of that testimony in placing responsibility for the murder squarely on

Mr. McCleskey. Moreover, the panel ignores the District Court's express findings that the State's other evidence was rife with contradictions and weaknesses which rendered the State's case – absent the confirming testimony of Offie Evans – an extremely shaky foundation for a verdict of malice murder or a sentence of death.

ARGUMENT

I

MR. MCCLESKEY AND HIS COUNSEL DID NOT (i) DELIBERATELY ABANDON HIS *MASSIAH* CLAIM, (ii) ACT WITH INEXCUSABLE NEGLECT, OR (iii) OTHERWISE ABUSE THE WRIT OF HABEAS CORPUS UNDER FEDERAL STANDARDS

The panel's judgment rests principally upon its conclusion that Mr. McCleskey – by asserting his Sixth Amendment claim under *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), only in a second federal petition – has abused the writ of habeas corpus. To affirm that judgment, the Court would have to repudiate 300 years of Anglo-American jurisprudence on habeas corpus, numerous squarely controlling precedents decided by the Court itself over more than half a century, and the repeated, considered decisions of Congress addressing the specific issue presented here.

A. ABUSE OF THE WRIT – THE DOCTRINAL BACKGROUND

1. The Common Law

Although the origins of the writ of habeas corpus ad subjiciendum are murky, and its earliest forms and usages are the subject of scholarly debate[19], there is general agreement

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[19] *See* 9 W. Holdsworth, *A History of English Law* 104-112 (2d Ed. 1938); W. Church, *A Treatise on The Writ of Habeas Corpus* 3 (2d Ed. 1893); Jenks, *The Story of Habeas Corpus*, 18 L. Q. Rev. 64 (1902). *See*

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with Blackstone's assessment that it is "the most celebrated writ in the English law:"[20]

> It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."

Fay v. Noia, 372 U. S. 391, 400 (1963), *quoting Secretary of State for Home Affairs v. O'Brien*, 1922 A.C. 603, 609 (H.L.).

For at least the past 300 years, since Parliament's passage of the Habeas Corpus Amendment Act of 1679,[21] English law has refused to treat a judgment denying habeas corpus relief as *res judicata*; a habeas claim, dismissed by one court, could be successively presented without limit:

> It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty.

Cox v. Hakes, 1890 A.C. 506, 527.

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also Oaks, *Habeas Corpus in the States – 1776-1865*, 33 U. Chi. L. Rev. 243 (1965), and authorities cited at note 2; Note *The Freedom Writ – The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657 (1948), and authorities cited at note 3.

[20] 3 W. Blackstone, *Commentaries on the Laws of England* 129.

[21] 31 Car. 2, ch. 2. *See* Goddard, *A Note on Habeas Corpus*, 65 L. Q. Rev. 30, 32-33 (1949).

Moreover, while a judicial decision *denying* relief allowed further adjudication, a ruling *discharging* an applicant was not subject to further judicial challenge: "[H]is right to his liberty could not afterwards be called into question. There was no power in any Court to review or control the proceedings of the tribunal which discharged him."[22]

2. The Early American Experience

In the fledgling states at the time of the American Revolution, "the privilege of the writ of habeas corpus was transmitted into American law principally through tradition and the common law." Oaks, *Habeas Corpus in the States – 1776-1865*, 33 U. Chi. L. Rev. 242, 247 (1965). In consequence, most state courts throughout the nineteenth century held that an adverse habeas corpus ruling was not *res judicata*, and that successive applications should be entertained.[23] Some states eventually did, by statute, begin to place

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[22] *Cox v. Hakes, supra*, at 528. This rule was not altered in Great Britain until 1959, when the Queen's Bench Division held in *In re Hastings* (No.2) [1959] 1 Q.B.D. 358 that a Divisional Court – faced with a renewed application on the same evidence and the same legal ground – "having once exercised its discretion" had "an inherent jurisdiction to refuse . . . to hear the same matter argued again." The following year, the *Hastings* decision was modified in part by The Administration of Justice Act, 1960, 8 & 9 Eliz. 2, ch. 65, Section 14 (2), which permits a second application if "fresh evidence" is offered by the applicant.

[23] *See, e.g., In re Perkins*, 2 Cal. 424, 430 (1852) ("The statute never contemplated that a judgment upon one writ should be a bar to any further proceeding, but looks to a different result; and any prisoner may pursue his remedy of *habeas corpus* until he has exhausted the whole judicial power of the State"); *In re Snell*, 31 Minn. 110, 112 (1883) ("In some courts there appears to be a disposition to make the right to a second writ a question of expediency for the court to determine. This occurs to us to be a dangerous notion. The 'writ of liberty' is a writ of right."); *People v. Brady*, 56 N.Y. 182, 192 (1874); *In re Blair*, 4 Wisc. 522, 532 (1854).

constraints on the use of successive applications,[24] but such statutes typically provided that second applications should be entertained if newly discovered evidence became available.[25]

Since neither the text of the federal Constitution, Art. I, § 9, cl. 2, nor the Federal Judiciary Act of 1789, 1 Stat. 81 (1789) – both of which explicitly provided for the writ of habeas corpus – fully defined its procedures or scope, most early federal cases followed the English practice permitting successor petitions. For example, in *Ex Parte Kaine*, 3 Blatchf. 1 (S.D.N.Y. 1853), 14 Fed Cas. p. 78 (Case No. 7,597), a district court held that federal practice on habeas applications would be governed by the common law:

> [A]ccording to that system of laws, so guarded is it in favor of the liberty of the subject, the decision of one court or magistrate . . . refusing to discharge the prisoner, is no bar to the issuing of a second or third or more writs, by any other court or magistrate having jurisdiction of the case; and that such court or magistrate may remand or discharge the prisoner, in the exercise of an independent judgment upon the same matters.

Id. at 80.[26]

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[24] *See, e.g., Ex parte Turner*, 36 Mo. App. 75, 77 (1889); *In re Brittain*, 93 N.C. 587, 588 (1885); *Hibler v. State*, 43 Tex. 197 (1875).

[25] *See, e.g., Hibler v. State*, 43 Tex. 197, 199 ("A party may obtain the writ of *habeas corpus* a second time by stating in the application therefor that since the hearing of the first application important testimony has been obtained, which it was not in his power to produce at the former hearing.") *Contra. Ex parte Pattison*, 56 Miss. 161 (1878).

[26] In another often-cited federal case, *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889), Justice Field, sitting as a circuit justice, was presented with a second habeas petition by an applicant whose initial application had been denied by the full Court, in an opinion by Justice Harlan. *Ex parte Cuddy*, 131 U.S. 280 (1889). Justice Field noted that the full Court had rejected Cuddy's application, in part, because the record he presented was not sufficient to clarify a crucial matter at issue, and that, under the circumstances, the Court presumed that the trial court had acted

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3. The Modern Federal Authorities

a. The Court's Pre-1948 Cases

While the lower federal courts had decided numerous habeas corpus cases under the Act of 1867 by the early

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properly. 40 F. at 64. On his successive application, Cuddy sought to supplement the record, adding the missing facts.

Addressing his application, Justice Field first considered the legal background:

> The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs . . . The doctrine of *res judicata* was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted. *Ex parte Kaine*, 3 Blatchf. 5, and cases there cited. The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions, is the doctrine prevailing now.

40 F. at 65.

Noting, however, that "[i]n many instances great abuses have attended this privilege," Justice Field held that "while the doctrine of *res judicata* does not appiy . . . the officers before whom the second application is made may take into consideration the fact that a previous application has been made to another officer and refused; and in some instances that fact may justify a refusal of the second." *Id.* 65-66.

In Cuddy's case, Justice Field reasoned, the second application was being made "upon the same facts presented, or which might have been presented, on the first." The opinion stressed that "there are no new facts which did not exist" earlier, *Id.* at 66, and that Cuddy neither (i) attempted to make a second, supplemented application, adding the omitted facts, before seeking to appeal nor (ii) suggested, at any point during his appeal, "that the record did not fully disclose [his] . . . case." *Id.* Under those circumstances, the writ was dismissed.

twentieth century,[27] this Court first spoke authoritatively to the question of successive petitions in *Salinger v. Loisel*, 265 U.S. 224 (1924). Salinger had successfully avoided federal mail fraud charges in the State of South Dakota through "a protracted resistance" in the courts. He had obtained adverse habeas rulings, on essentially the same ground, from federal district and circuit courts in New York and from federal district and circuit courts in Louisiana – all prior to his presentation of the application eventually considered on certiorari by the Court. 265 U.S. at 228.

Although the Solicitor General strongly urged the Court to invoke *res judicata* as a bar to Salinger's successor petition for habeas corpus, the Court declined to do so:

> We are unable to go so far. At common law the doctrine of *res judicata* did not extend to a decision on *habeas corpus* refusing to discharge the prisoner. The state courts generally have accepted that rule where not modified by statute; the lower federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point.

265 U.S. at 230. Instead, after reviewing both the pertinent federal habeas statute[28] – which directed the court "to dispose of the party as law and justice may require" – and the decisions of lower federal courts applying the statute, the Court declared that

> each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled

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[27] In 1927, Professor Dobie, surveying the federal judicial treatment of habeas corpus cases under the Act of 1867, wrote: "[T]he federal courts have grounded their decisions in *habeas corpus* cases not on literal technicalities but on a broad conception of essential justice. The Supreme Court has manifested somewhat the spirit of a chancellor in formulating a decree in equity." Dobie, *Habeas Corpus in the Federal Courts*, 13 Va. L. Rev. 433, 458 (1927).

[28] The Habeas Corpus Act of Feb. 5, 1867, ch. 28, § 761, Rev. Stat., 14 Stat. 385.

> by a consideration of whatever has a rational bearing on the propriety of the discharge sought . . . [including] a prior refusal to discharge on a like application.

Id. Since the district and circuit courts had exercised their discretion to reach the merits of Salinger's claims, the Court did so as well, rejecting the merits as insufficient. *Id.* 232-238.

The Court clarified what "sound judicial discretion" might require in *Wong Doo v. United States*, 265 U.S. 239 (1924), another successive petition case rendered the same day as *Salinger*. Wong Doo, seeking to avoid deportation, had filed an initial petition asserting two grounds. The government's return had placed both grounds at issue. Yet at his initial federal hearing, Wong Doo had presented evidence and sought adjudication only on the first ground. When the initial litigation proved unsuccessful, Wong Doo filed a second federal application, reasserting the abandoned second ground. 265 U.S. at 240.

The Court, though reiterating that *res judicata* was no absolute bar to Wong Doo's application, nonetheless affirmed the lower court's dismissal. Since Wong Doo had failed to offer any proof on his second claim at the initial federal hearing – even though, the Court observed, he "had full opportunity" to do so, since the proof "was accessible all the time," 265 U.S. at 241 – his claim was properly dismissed. "To reserve the proof for use in attempting to support a later petition, if the first failed," the Court held, "was to make an abusive use of the writ of *habeas corpus*." *Id.*

In the next twenty years, the Court decided a number of habeas claims brought on second applications, some of them favorably to the applicant.[29] The most significant was *Price v.*

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[29] *In United States ex rel. McCann v. Adams*, 320 U.S. 220 (1943), for example, the Court held that the lower courts should not have dismissed a second habeas petition – brought by the relator after this Court had itself denied his first application, *see Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) – since the issue presented in the

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Johnson, 334 U.S. 266 (1948), in which a federal prisoner alleged, on his *fourth* federal application, that the Government had induced a key witness to change his testimony during the trial, thereby suborning perjury. The exasperated lower court denied relief, stressing (i) that Price had litigated two prior habeas petitions through the courts of appeals, *Price v. Johnston*, 161 F.2d 705, 706 (9th Cir. 1947), (ii) that Price had proffered "no reason or excuse . . . for his failure to set [the prosecutorial misconduct claim] up in . . . his prior petitions," *Id.* at 707, and (iii) that, since the witness had changed his testimony openly during the course of the trial, Price appeared to know "as much about the [alleged] misconduct at the time it is said to have occurred as he knows now." *Id.*

Despite these considerations, the Court refused to dismiss Price's petition:

> If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

334 U.S. at 291.

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second application "was explicitly withdrawn from consideration on the habeas corpus proceedings previously before the Circuit Court of Appeals [and] . . . has never been adjudicated on its merits by the lower courts." 320 U.S. at 221.

In *Waley v. Johnston*, 316 U.S. 101 (1942), the Court held that, when an applicant proffered an excuse for his failure to present a claim on an earlier coram nobis application, a second petition ought not be denied without a hearing. 316 U.S. at 105.

b. The Congressional Choice

Price was decided one month before Congress enacted a comprehensive codification of the Judicial Code which included, for the first time in eighty years, a new federal statute addressing the writ of habeas corpus. In drafting what became 28 U.S.C. § 2244, Congress carefully considered pleas by respected jurists, among others,[30] for a provision that would sharply curtail the traditional federal policy allowing successive habeas applications. However, the House Judiciary Committee, in its report on the 1948 legislation, emphasized that its intent in presenting proposed § 2244 was to "make[] no material change in existing practice." H.R. Rep. 308, 80th Cong., 1st Sess. A178 (1947).[31]

The Senate Judiciary Committee, for its part, while accepting other recommendations from the Judicial Conference, chose to modify the language of its proposed § 2244 to emphasize that federal courts would retain their traditional

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[30] *See, e.g., Report of the Judicial Conference of Senior Circuit Judges* 18 (1945); *Report of the Judicial Conference, Rep. Att'y Gen.* 67-69 (1943). *See also* Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172 (1948) (decrying "evils . . . [from] this flood of litigation"); Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948) (lamenting that during the preceding decade, 26 inmates of Alcatraz had filed 167 petitions). Other judges expressed their dissatisfaction in reported opinions. *See, e.g., Dorsey v. Gill*, 148 F.2d 857, 864 (App. D.C. 1945), *cert. denied*, 325 U.S. 890 (1945) (cataloging at great length the dimensions of the federal burden and the possible remedies that could be adopted).

[31] The House Judiciary Committee indicated that it was far from oblivious to the problem of abusive petitions; on the contrary, it explicitly noted that "[t]he practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts." H.R. Rep. 308, 80th Cong. 1st Sess. A178 (1947). Yet the Report concluded that the current procedures were adequate to protect against abuses: "[T]he courts have consistently refused to entertain successive 'nuisance' applications for habeas corpus." (*Id.*)

equitable power to entertain successive petitions. "The original language of the section," the Senate Committee feared, might be read to

> den[y] to Federal judges the power to entertain an application for a writ of habeas corpus where the legality of the detention has been determined on a prior application. The amendment [would] . . . modify this provision so that, while a judge need not entertain such a later application for the writ under such circumstances, he is not prohibited from doing so if in his discretion he thinks the ends of justice require its consideration.

S. Rep. No.1559, 80th Cong. 2d Sess 9 (1948).

Section 2244, as revised, passed the full Senate and became law on June 25, 1948. During the succeeding eighteen years, literally dozens of efforts were made to persuade Congress to narrow § 2244. As Justice Harlan subsequently noted,

> [c]oncern with existing and potential abuse of the remedy . . . led to proposals that successive applications . . . on grounds previously available would be wholly barred. . . . E.g., HR 4232, 79th Cong, 2d Sess. These proposals were rejected in favor of the traditional discretion exercised by courts with respect to successive applications. . . .

Sanders v. United States, 373 U.S. 1, 26 (1963). *See also* H.R. Rep. No. 1892, 89th Cong., 2d Sess. 3 (1966) (reciting other proposed bills). None of these efforts succeeded.

c. The Court's Opinion in *Sanders*, And Its Congressional Ratification

In 1963, the Court decided *Sanders v. United States*, in which it distinguished between two basic types of successive petitions and announced different modes of analysis appropriate to each.

The truly "successive petition," the Court held, involves a second presentation of a claim previously adjudicated, adversely, on its merits. 373 U.S. at 15. Contrasted with successive petitions are repeater applications asserting claims that, for variety of reasons, were never judicially determined

on an earlier application. *Id.* at 17. "Full consideration of the merits" of these latter applications, the Court held, "can be avoided only if there has been an abuse of the writ. . . . " 373 U. S. at 17.

To determine whether a claim is abusive, *Sanders* directed the federal courts to apply the historically established principles of equity jurisprudence:

> "[H]abeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks . . . Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one . . . he may be deemed to have waived his right to a hearing . . . The same may be true if, as in Wong Doo, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

372 U.S. at 18.

For further guidance, the Court directed the lower courts to its simultaneous rulings in *Fay v. Noia*, 372 U.S. 391, 438-440 (1963), and *Townsend v. Sain*, 372 U.S. 293, 317 (1963), whose principles, the Court held, "govern equally here." 373 U.S. at 18. *Fay* and *Townsend* propound a two-pronged test for determining whether a habeas applicant should be heard on the merits of his claims: (i) whether he "deliberately abandoned or bypassed" an opportunity to assert the claim; and if not, (ii) whether his failure to do so was somehow a product of "inexcusable neglect."

(i) "Deliberate Bypass"

Deliberate bypass or abandonment, the Court explained in *Fay*, should be measured in accordance with

> the classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464 [1938] – "an intentional relinquishment or abandonment of a known right or privilege."

372 U. S. at 439. In deciding whether an applicant has deliberately bypassed or abandoned a claim, the Court rejected any tendency "to introduce legal fictions into federal habeas corpus." *Id.* Instead, the Court insisted, analysis must focus upon the applicant's actual state of mind, and it must probe, not only whether his decision was voluntary, but whether it was "knowing and intelligent" as well.

In so holding, the Court acted consistently with prior federal case law reserving condemnation for habeas applicants, like Wong Doo, who had deliberately held back evidence that was already in their possession or was readily at hand.[32]

Congress subsequently modified § 2244 in 1966, and in doing so, it adopted the distinction the Court had drawn in *Sanders*. We respectfully refer the Court to the Brief on Behalf of Respondent in *Zant v. Moore*, (No. 87-1104), ___ U.S. ___, 109 S.Ct. 1518 (1989), pages 28-29, for a more thorough account of the legislative history of 28 U.S.C. § 2244(b). In short, although the House Judiciary Committee indicated that, in fashioning § 2244(b), it intended to provide "for a qualified application of res judicata," H.R. Rep. No. 1892, 89th Cong., 2d Sess. 8 (1966), the Senate Report identified the target of the preclusion principle as those "applications either containing allegations identical to those asserted in a previous application that has been denied, *or predicated upon grounds obviously well known to them when*

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[32] *See, e.g., Swihart v. Johnston*, 150 F.2d 721, 723 (9th Cir. 1945) (while second petition included certain evidentiary allegations that first petition did not, "[o]bviously . . . these matters (if true) were known to appellant when he filed the [earlier] petition"); *Garrison v. Johnston*, 151 F.2d 1101, 1013 (9th Cir. 1945) (same); *Turner v. United States*, 258 F.2d 165, 167 (D.C. Cir. 1958) (allegations could have been raised in prior application, and applicant presented "[n]o indication of any 'justifiable reason' or 'unawareness' to explain their omission").

they filed the preceding application." S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966) (emphasis added).

When Congress in 1976 revisited the question of successive petitions – in Rule 9(b) of the Rules Governing Section 2254 Cases – it once again clarified its intention that applicants should not be barred from asserting new claims on a second habeas application absent proof of deliberate bypass or inexcusable neglect.[33] In its own subsequent decisions, the Court has adhered to these standards set forth in *Sanders*, § 2244(b), and Rule 9(b). *See, e.g., Smith v. Yeager*, 393 U.S. 122 (1968) (per curiam) (allowing claim on second federal application despite counsel's apparent waiver of federal hearing on identical claim during prior application).

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[33] Exercising its reserved authority under 28 U.S.C. § 2072, Congress did *not* initially allow the Judicial Conference Rules to become law. Instead, in response to sharp criticism from some quarters, Congress voted to delay the effective date of the proposed rules in order to afford itself the opportunity to review and amend the rules if necessary. *See* Act of July 8, 1976, Pub. L. No. 94-349, 90 Stat. 822.

In its ultimate report on the proposed Rules, the House Committee on the Judiciary recommended a change in the language proposed by the Judicial Conference for Rule 9(b):

> The committee believes that the 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition. The 'abuse of writ' standard brings rule 9(b) into conformity with existing law. As the Supreme Court has noted in reference to successive applications for habeas corpus relief and successive § 2255 motions based upon a new ground or a ground not previously decided on the merits, 'full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.' *Sanders v. United States*, 373 U.S. 1, 17 (1963). See also 28 United States Code, section 2244(b).

H.R. Rep. No. 94-1471, 94th Cong., 2d Sess. (1976). On September 28, 1976, Rule 9(b) was enacted into law. Act of Sept. 28, 1976, Pub. L. 94-426, 90 Stat. 1335.

(ii) "Inexcusable Neglect"

The Court's doctrine on inexcusable neglect begins with *Townsend v. Sain*, a right-to-a-federal-hearing case. The Court clarified in *Townsend* that "inexcusable neglect" would require more than mere "neglect;" indeed, such conduct must so closely approach deliberate manipulation that a court can only attribute the neglect to a willingness to subvert orderly judicial process, not mere carelessness. Thus in *Townsend*, the Court declined to brand as "inexcusable" a defense counsel's failure at trial to develop fully the testimony of his own crucial expert witness.[34]

In subsequent cases, the Court has faulted those applicants who offer no explanation for their failure to present claims in earlier applications when the evidence to support them was, to all appearances, available at the time of those earlier applications. In *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam), for example, Justice Powell criticized a repeater petition when the only "new evidence" advanced in support of a claim of insanity was "the report of a forensic psychiatrist . . . [without any] expla[nation] why this examination was not conducted earlier." 464 U.S. at 379-380 (Powell, J., concurring). The Court has also rejected repeater petitions accompanied by plainly spurious explanations. Thus, in *Antone v. Dugger*, 465 U.S. 200 (1984) (per curiam), the

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[34] Townsend sought an evidentiary hearing on a claim that his confessions had been the product of a drug-induced state brought on by the State's administration of a "truth serum" during his custodial interrogation. 372 U.S. at 295-303. Although there had been extensive expert testimony at trial on the drug's effects on Townsend, his counsel had failed to develop fully the point that the drug involved was "a truth serum" which might have prompted Townsend's confession. 372 U.S. at 321. The Court reasoned that "[t]his fact was vital to whether his confession was the product of a free will and therefore admissible," and that "the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default." 372 U. S. at 322. Thus although the counsel plainly erred by neglecting to ask his own witness certain crucial questions, the Court refused to brand his conduct "inexcusable."

applicant's only excuse for failing to carry forward a prosecutorial misconduct claim was "the press of time during the first set of collateral proceedings." 465 U.S. at 203. After reviewing the record, the Court rejected this explanation, underscoring that (i) "almost two years [had] . . . elapse[d] between the affirmance of [Antone's] . . . conviction and the filing of his first motion for postconviction relief," 465 U.S. at 206 n.4; (ii) Antone "continued to be represented throughout this period by his trial counsel," *id.*; and (iii) inasmuch as a stay had been granted by the Court of Appeals, the "first federal habeas petition . . . was not conducted under the pressure of imminent execution." Id.

By contrast, the presentation of a new claim in a second or successive federal habeas petition has consistently been held excusable by the lower courts when it was based upon the applicant's discovery of new evidence neither previously known to him nor readily at hand, especially when State actors bear some responsibility for withholding that evidence. *See, e.g., Hamilton v. McCotter*, 772 F.2d 171, 183-184 (5th Cir. 1985); *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) (en banc); *Johnson v. Cabana*, 661 F.Supp. 356 (S.D. Miss. 1987); *cf. Lewis v. Lane*, 832 F.2d 1446, 1456-1457 (7th Cir. 1987); *Freeman v. Georgia*, 599 F.2d 65, 72 (5th Cir. 1979). These cases have followed *Price v. Johnston* and the express statement of the Advisory Committee on the Rules that "newly discovered evidence" is one of several circumstances sufficient to excuse a prior failure to assert a claim. See Advisory Committee Notes on Rule 9(b).

(iii) Other Inequitable Conduct

Sanders' catalogue of abusive behavior was not strictly limited to instances of deliberate bypass or inexcusable neglect. Instead, emphasizing that equitable principles govern habeas corpus generally, the Court posited a general axiom that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders v. United States, supra*, 373 U.S. at 17. A federal court need not "tolerate needless piecemeal litigation, or . . . entertain collateral

proceedings whose only purpose is to vex, harass, or delay." *Id.* at 18.

Both these words and the Court's reference to general equitable principles illuminate the limits of its concept of "abuse." Vexatiousness, harassment and delay had long been attributes identified with professional writ writers of the sort Judge Goodman described in his article, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 315 (1948) (detailing abuses by Alcatraz inmates). To curb such abuses, the Court called for the kind of a judicial inquiry historically conducted by a chancellor in equity: Has the applicant acted in good faith? Does he come to the litigation with clean hands? Should either party be estopped from asserting a claim (or a defense) because of its prior conduct?

> All of these questions, the Court in Sanders held, are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power – and, if the ends of justice demand, the duty – to reach the merits.

373 U.S. at 18-19.

B. THE DISPOSITION OF MR. McCLESKEY'S CASE

As we have seen, *Sanders*, § 2244(b), and Rule 9(b) establish controlling standards by which to evaluate assertions of abuse of the writ. To determine whether Mr. McCleskey's *Henry/Massiah* claim constitutes an abuse, the first issue – and according to the Court of Appeals, the dispositive issue – is whether McCleskey "deliberately abandoned" his *Massiah* claim.

1. Mr. McCleskey Did Not Deliberately Abandon His *Massiah* Claim Or Bypass Orderly Judicial Procedures On His Initial Application

The District Court's factual findings on deliberate abandonment were not set aside by the Court of Appeals as

"clearly erroneous" under Rule 52(a), nor could they be. They therefore provide the foundation for subsequent review of this issue. *Amadeo v. Zant*, 486 U.S. 214, 223-22 (1988); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-576 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-293 (1982).[35]

The panel purports to accept these findings (J.A. 123), differing only on a legal issue – "the meaning of deliberate abandonment." (J.A. 124). Yet as its opinion unfolds, the panel brands the investigation by Mr. McCleskey's counsel as "somewhat lacking" (J.A. 126), and declares broadly that to abandon a claim after "initial investigatory efforts" prove unsuccessful "cannot insulate a petitioner from abuse of the writ." (J.A. 127). The panel concludes its analysis with a holding that "counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus." (J.A. 129).

This analysis is subject to two possible interpretations: (a) either the panel has added a new, "thorough investigation" requirement to the traditional "deliberate bypass" inquiry, or (b) the panel has rejected, *sub silentio*, the District Court's factual findings that Mr. McCleskey's counsel conducted a reasonably adequate investigation. We will deal with the first

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[35] The District Court's principal findings on the delibertate bypass issue are as follows: (i) that "[a]t the time of his first federal petition, petitioner was unaware of [informant] Evans' written statement" (J.A. 83-84); (ii) that "petitioner did not have . . . Worthy's testimony at the time of his first federal petition" (J.A. 84); (iii) that "counsel did conduct an investigation of a possible *Massiah* claim prior to the first federal petition," one which, measured by the standards of "reasonably competent counsel," was adequate (J.A. 84-85); (iv) that there was "no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim" (J.A. 85); (v) that conducting interviews with three Atlanta police officers and jailors who later testified at the federal hearing "would [not] have allowed petitioner to assert this claim any earlier" (J.A. 85); and (vi) that the Massiah claim "was dropped because it was obvious that it could not succeed given the then-known facts." (J.A. 83).

possibility under the present heading; we will address the latter possibility under the heading of "inexcusable neglect."

Our earlier doctrinal review makes clear just how radically the panel's "thorough investigation" requirement departs from prior law. Since at least *Salinger* and *Wong Doo* in 1924, the primary focus of the federal law of abuse has been an applicant's good or bad faith, his possible inequitable manipulation of process. To check such misconduct, the Court and the Congress have settled upon a standard focused principally upon the subjective intent of the applicant (and his counsel). *Cf. Oregon v. Kennedy*, 456 U.S. 667 (1982). At its core are three questions drawn from *Johnson v. Zerbst*: Was the applicant's action voluntary? Was it knowing? Was it intelligent? If newly proffered evidence was "obviously well known" to an applicant, if that evidence was "accessible at all times," if an applicant had "full opportunity to offer proof of it" and simply "reserve[d] the proof for use in . . . a later petition," then his failure to assert the claim was voluntary, knowing and intelligent, and deliberate bypass has been shown.

The panel's new rule, by marked contrast, would impute to Mr. McCleskey not only knowledge which is so "accessible," so close to hand, that it "must have been" known, but all knowledge that, on judicial hindsight, *might somehow* have been obtained from a "thorough investigation." Good faith becomes irrelevant; proof of a "purpose to vex, harass or delay," unnecessary.

Whatever might be said for the wisdom of such a rule, it is indisputably not the present law. It cannot be squared with *Wong Doo*, with *Price*, with *Sanders*, with *Smith*, or with *Woodard* and *Antone*. More important, it cannot be squared with congressional intent, for in enacting § 2244, § 2244(b), and Rule 9(b), which incorporate the *Sanders* standard, Congress made a series of choices. It was presented with abundant evidence concerning the extent of the perceived problem, the apparent need for change, and the statutory alternatives – some of them nearly identical to the new rule adopted by the panel below. Yet Congress unmistakably rejected those alternatives. By dismissing, or ignoring, those Congressional choices and substituting its own, the panel erred. *See, e.g.*,

Autry v. Estelle, 464 U.S. 1301 (1983) (White, circuit justice).[36]

Moreover, even if the law permitted the fruits of a reasonable investigation to be imputed to counsel, Mr. McCleskey's attorneys conducted an investigation which the District Court later found to be "reasonably competent."[37]

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[36] "In my view, it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus. Except in unusual circumstances, successive writs would be summarily denied. But historically, res judicata has been inapplicable to habeas corpus proceedings . . . and 28 U.S.C. § 2254 Rule 9 implicitly recognized the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated." 464 U.S. at 1303.

[37] We note the following steps, all of them indisputably taken by Mr. McCleskey's attorneys:

- o trial counsel formally moved to obtain all statements and exculpatory evidence from the State;
- o trial counsel renewed his request at trial, demanding all documents in the State's possession that reflected oral statements by McCleskey;
- o trial counsel appealed the issue of access to such statements;
- o habeas counsel, despite the lack of prior success by trial counsel, nonetheless asserted a Massiah claim;
- o habeas counsel sought to learn, through police officers' advice, which jail officials were most likely to know about any Massiah violation;
- o habeas counsel then interviewed those jail officials;
- o habeas counsel, having learned about a retired jail official who had been responsible for cell placement in 1978, tracked that jailor down to a town 90 miles away, to no avail;
- o habeas counsel sought from the State, and was given, what the State represented to be "a complete copy of the prosecutor's file;"

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What thwarted their efforts to prove their *Massiah* claim was not their own lassitude but the State's ten-year pattern of suppression of evidence, denial, and perjury. This is not a story of deliberate abandonment by an applicant, but of deliberate concealment by the State. *See Amadeo v. Zant, supra.*

The only legal standard under which counsel's investigation could properly be faulted would be a strict liability standard. If habeas attorneys are to be charged with knowledge of all possible evidence, no matter how obscure or tangential, no matter how thoroughly hidden by State actors, then Mr. McCleskey's attorneys are guilty of deliberate bypass. Nothing Congress has ever done, indeed, nothing we have found in the past 300 years of habeas corpus jurisprudence, would support the adoption of such a standard.

2. Mr. McCleskey's Conduct In Investigating His *Massiah* Claim Did Not Constitute "Inexcusable Neglect"

The District Court found that Mr. McCleskey's failure to raise the *Massiah* claim "was not due to his inexcusable neglect." (J.A. 84). "Reasonably competent counsel at the time of the first petition," the court held, would not have discovered either the statement of informant Evans or jailor Worthy. (J.A. 84-85)

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- o habeas counsel asked the prosecutor and the informant, under oath, whether there had been an improper relationship;
- o when the informant's 21-page statement was uncovered, habeas counsel immediately filed a second federal habeas petition;
- o habeas counsel questioned police officers to learn where the 21-page statement had been taken from Evans;
- o habeas counsel, having learned that it had been taken in jailor Worthy's office, found and subpoenaed Worthy to determine whether he had any relevant knowledge.

Although the panel purports not to overturn these factual findings, in truth it takes a sharply different view of the evidence. While the District Court found, for example, that informant Evans' 21-page statement "contains strong indications of an *ab initio* relationship between Evans and the authorities" (J.A. 84), the panel dismisses the statement as "[a]t most . . . simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously." (J.A. 128).[38] The District Court carefully examined the question whether reasonable counsel would have located jailor Worthy (J.A. 84-85) and it ultimately found "no . . . reason that petitioner or his counsel should have known to interview Worthy specifically." (J.A. 85). The panel reaches almost precisely the contrary conclusion: "McCleskey has not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 . . . [or why] a more extensive effort at that time . . . would not have turned up Worthy." (J.A. 128).[39]

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[38] The panel's assessment undervalues the statement in at least two important respects. (i) It was Evans' statement that provided the *sole direct link* between Offie Evans and Ulysses Worthy. Only when Detective Harris revealed, on crossexamination, that Evans' statement had been taken in jailor Worthy's office did Worthy first emerge as a possible witness from among the hundreds of jailors employed at the Fulton County Jail in July of 1978. *Second*, even had jailor Worthy somehow miraculously come to counsel's attention independently of the 21-page statement, his testimony alone could not have supplied proof of the "deliberate elicitation" required by *Massiah* and subsequent cases. It is Evans' own boastful statement that reveals his aggressive, persisteht interrogation of Mr. McCleskey – how completely Offie Evans moved from being a mere "listening post" or an "ear" to become a "voice . . . to encourage conversation."

[39] The panel's critique focuses upon a single strand of evidence that McCleskey's attorneys failed to pursue: follow-up interviews with three Atlanta law enforcement officers mentioned during state habeas proceedings. (J.A.126 n.12).

The panel's critique ignores two critical considerations. *First*, during the state habeas proceedings Mr. McCleskey's counsel heard Assistant

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In sum, the panel's analysis appears strikingly similar to the opinion faulted by this Court in *Amadeo v. Zant*, 486 U.S. 214 (1988). As in *McCleskey*, the issue in *Amadeo* was whether evidence, hidden by the State, was nonetheless "reasonably discoverable" by defense counsel. 486 U.S. at 222. As here, the district court in *Amadeo* after the receipt of live testimony and other evidence, made factual findings concerning the adequacy of defense counsel's investigation and the accessibility of the crucial evidence. 486 U.S. at 223. A panel of the court of appeals in *Amadeo* thereafter "substituted its own factual findings for those of the District Court" and "rejected . . . the District Court's conclusion that petitioner's lawyers did not deliberately bypass" appropriate judicial proceedings. 486 U.S. at 224. The same error appears to have recurred here. Unquestionably, *either* the panel's holding in *McCleskey* is a radical departure from the settled law of deliberate bypass – as we argued above – *or* it is a flat violation of *Amadeo v. Zant*, as we argue here. In either event, it should be reversed by this Court.

The panel's decision offends not only Rule 52 but the very concept of inexcusable neglect. On this record, what is inexcusable and what has delayed Mr. McCleskey's presentation of his *Massiah* claim to the courts for a decade is not any neglect on his part but concealment on the part of State officials. Unlike *Hutchins* or *Antone*, Mr. McCleskey's lawyers sought out all available evidence. They affirmatively presented what little they found to the state habeas court, and

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District Attorney Russell Parker – the police officers' superior and the State official charged with overall responsibility for the investigation and prosecution of the *McCleskey* case – testify under oath that the State had not entered into an informant relationship with Offie Evans prior to McCleskey's trial. *Second*, the District Court later found that one or more of the officers who, the panel believed, should have been interviewed, lied under oath in federal court to cover up their own prior misconduct.(J.A. 90). It is little wonder that the District Court held that counsel's failure to interview these officers would not have led to jailor Worthy sooner. (J.A. 85).

they sought in good faith to learn from responsible state officials whether there might be anything else to proffer. Only after those officials testified under oath that their conduct had been blameless and that McCleskey's suspicions were baseless did his counsel decide to drop the claim. That decision, made in good faith reliance upon the word of State officials, however naive it later proved, is not what this Court has ever meant by "inexcusable neglect."

3. Mr. McCleskey Did Not Otherwise Abuse The Writ

We have shown that Mr. McCleskey did not deliberately withhold his *Massiah* claim, and that his attorneys were not guilty of inexcusable neglect. The final inquiry is whether the actions of the parties provide any other equitable basis for barring consideration of the claim.

The equities, however, strengthen rather than weaken McCleskey's entitlement to be heard on the merits. On Mr. McCleskey's part, there is no evidence of bad faith. His lawyers did all they reasonably could to present evidence of a *Massiah* violation promptly to the state habeas corpus courts. A decision to carry the *Massiah* claim forward into federal court – to continue to assert serious charges against State officials despite what appeared to have been a full hearing, despite sworn denials by State officials, despite an absence of contrary evidence – would have been, at the least, a wasteful gesture and, at the most, an irresponsible plea.

A review of the State's conduct, by contrast, leads inexorably to a finding of bad faith. In various contexts, this Court has traditionally imputed the misconduct of any member of the prosecution team to the State itself. *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935); *Brady v. United States*, 373 U.S. 83 (1963). The good faith of some State actors cannot excuse the bad faith of others. Especially is this true when Sixth Amendment claims are under consideration. As Justice Stevens explained in *Michigan v. Jackson*, 475 U. S. 625, 634 (1986),

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.

See also Giglio v. United States, 405 U. S. 150, 154 (1972); *Santobello v. New York*, 404 U.S. 257, 262 (1971); *Cf. United States v. Bagley*, 473 U.S. 667, 671 & n.4 (1986).[40] It is surely appropriate in habeas corpus for the State's conduct, no less than the applicant's, to be judged by equitable standards. And since "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks," *Sanders v. United States, supra*, 373 U.S. at 17, the State here, because of the misconduct of State actors, should be disentitled to assert its defense of abuse-of-the-writ.

A variety of equitable doctrines support this conclusion. The State has brought unclean hands to this litigation.[41] State actors did far more than merely violate *Massiah*. When defense counsel began to investigate the relationship between Offie Evans and Atlanta police, those State actors affirmatively suppressed evidence and lied in an effort to hide their

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[40] The lower federal courts have regularly applied this rule to police misconduct of the sort at issue here. *See. e.g., Freeman v. State of Georgia*, 599 F.2d 65, 69-70 (5th Cir. 1979) ("We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team"); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure . . . ."); *Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1971); *Jackson v. Wainwright*, 390 F.2d 288, 296 (5th Cir. 1968); *Curran v. State of Delaware*, 259 F.2d 707, 713 (3d Cir. 1958).

[41] As Professor Dobbs has noted "unclean hands may be any sort of conduct that equity considers unethical . . . Th[e] rule is that unrelated bad conduct is not to be considered against the plaintiff. It is only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claim, that he is to be barred because of this conduct. 'What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts. . . . ' " D. Dobbs, *Equity and Equitable Remedies* 46 (1973), *citing Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347 (9th Cir. 1963).

misconduct. These acts constituted an independent wrong, separate from, though in furtherance of, the initial *Massiah* violation. Since the essence of the State's abuse defense depends upon Mr. McCleskey's delay in discovering the evidence that State officials were actively hiding, the State dirtied its hands in the very act of acquiring the defense that it now asserts against Mr. McCleskey.

Additionally, the State's conduct in suppressing Evans' statement should equitably estop it from claiming abuse.[42] The Court could even draw on more ancient doctrines, such as the venerable maxim "*omnia praesumuntur contra spoliatorem*," which

> embraces most frequently cases of the destruction or suppression of written evidence . . . [B]ut it has been said that to smother evidence is not much better than to fabricate it. [Black, J., in Bryant v. Stillwell, 24 Pa. St. 314 (1855).] "Spoliation," it is said in one case, [Little v. Marsh, 2 Ired. Eq. 28 (1841)] "is always looked upon by a court of justice with suspicion."

Lawson, *The Effect of Withholding, Suppressing and Manufacturing Evidence in Civil Cases*, 18 Am. L. Rev. 185, 200 (1884).

Indeed, the principle that a court should not permit a party to profit by its own wrongdoing is so fundamental that, in one guise or another, it pervades all areas of the law. No special rule need be fashioned to bar the State from asserting

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[42] Equitable estoppel, Professor Dobbs has explained, ordinarily "has three important elements. The actor, who usually must have knowledge of the true facts, communicates something in a misleading way, either by words, conduct or silence. The other relies upon that communication. And the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct." D. Dobbs, *Equity and Equitable Remedies* 42 (1973); *see* 3 J.Pomeroy, *Equity Jurisprudence* § 804 at 189 (5th Ed. 1941). *See generally, Moser v. United States*, 341 U.S. 41, 46-47 (1951); *Portmann v. United States*, 674 F.2d 1155, 1167 (7th Cir. 1982); *TRW, Inc. v. FTC*, 647 F.2d 942, 950-951 (1981) *Beacom v. EEOC*, 500 F. Supp. 428, 435-439 (D. Ariz. 1980).

of an abuse-of-the-writ defense against Warren McCleskey on the present record.[43]

III

THE STATE'S USE OF OFFIE EVANS' TESTIMONY AGAINST WARREN McCLESKEY DURING HIS CAPITAL TRIAL WAS NOT "HARMLESS ERROR" BEYOND A REASONABLE DOUBT

A. The Findings Of The District Court

The District Court made a number of important factfindings that were subsidiary to its conclusion that the State's Massiah violation was not harmless. It began its analysis by correctly noting that there had been no witnesses to the shooting (J.A. 89) and that the murder weapon had never been recovered. (*Id.*). The court then found that the State's case against Mr. McCleskey *on the murder charge* had been three-pronged: (i) evidence that McCleskey had carried a .38 Rossi, the pistol that most likely fired the fatal bullets, on the day of

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[43] The Court, in granting certiorari, framed its own question on the issue of abuse:

> Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

McCleskey v. Zant, ___ U.S. ___, 110 S.Ct. 2585 (1990). Our foregoing discussion should indicate our answers to this question. First, although the State must plead deliberate abandonment, as Georgia did here, we concede that the burden of proof then falls upon the petitioner. Second, the State need not rest its allegations of abuse on charges of deliberate abandonment; inexcusable neglect or other vexatious conduct are alternative bases for a finding of abuse. If the State does charge deliberate bypass, however, the decisive issue is whether a claim was abandoned "deliberately." It is not enough to find that the claim was, in fact, abandoned; a court must find that the applicant did so in a voluntary, knowing, and intelligent way, that he exhibited a bad faith intention to reserve proof "obviously well known" to him or "accessible at all times." There is no basis here for such a finding against Warren McCleskey.

the robbery; (ii) testimony by co-defendant Ben Wright that McCleskey later told Wright he had pulled the trigger; and (iii) testimony by informant Offie Evans' about McCleskey's "jailhouse confession." (*Id.*).

In assessing the weight of this evidence, the District Court found that the first two prongs were not powerful. The State's evidence on the first prong – who was carrying the murder weapon on the day of the crime – was in conflict. (J.A. 89). Indeed, one of the State's witnesses, Mary Jenkins, had been confronted on cross-examination with a prior statement to police in which she identified her boyfriend, Ben Wright, and not McCleskey, as the person who regularly carried the .38 Rossi. (J.A. 11-13).

The District Court also found that Ben Wright's damaging testimony, recounting Mr. McCleskey's ostensible confession to Wright, was "obviously impeachable" because Wright was himself a prime suspect in the shooting who had a clear motive to shift responsibility for the murder to someone else. (J.A. 30)

Having found that the State's other evidence against McCleskey on the murder count was weak or in conflict, the District Court concluded that Offie Evans' testimony detailing McCleskey's ostensible jailhouse confession "was critical to the state's case" (J.A. 89) and that its admission into evidence was not harmless.

B. The Panel's Contrary View Of The Record

The panel disregarded the District Court's key findings of fact on the harmless error issue, substituting its own instead. Addressing the identity of the robber who carried the .38 Rossi, for example, the panel cited *only* that portion of the trial testimony that pointed toward McCleskey (J.A.133); it ignored both the strong contrary evidence and the District Court's express finding that the testimony was "conflicting." Similarly, the panel noted co-defendant Ben Wright's testimony that McCleskey had confessed to being the triggerman (J.A. 133); it ignored the District Court's finding that Wright's testimony was "obviously impeachable."

In sum, while the District Court found that the non-tainted evidence was severely compromised, the panel on appeal independently reweighed that evidence and found that it "presented a clear indication of McCleskey's guilt." (J.A. 135). Having thus substituted its own reading of the record for that of the District Court, the panel concluded that the State's introduction of Offie Evans' jailhouse confession was harmless error.[44]

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[44] The panel made several references to the opinion announced by the *en banc* Eleventh Circuit on Mr. McCleskey's initial federal habeas appeal. The District Court, on that first petition, granted habeas relief to Mr. McCleskey under *Giglio v. United States*, 405 U.S. 150 (1972), finding that Offie Evans had lied to the jury by failing to disclose that his testimony was being given in exchange for a promise from State officials. *McCleskey v. Zant*, 580 F. Supp. 338, 381-383 (N.D. Ga. 1984). The en banc Court of Appeals later reversed that judgment, finding that any *Giglio* violation had constituted harmless error. *McCleskey v. Kemp*, 753 F.2d 877, 884-885 (11th Cir. 1985) (en banc). While the panel below acknowledged that the en banc court's earlier holding "occurred in the context of McCleskey's *Giglio* claim" (J.A. 131), it nonetheless concluded that the prior holding "clearly has bearing on the import of Evans' testimony in the context of McCleskey's *Massiah* claim." *Id.*

Yet very different evidentiary consequences flow from findings of *Giglio* and *Massiah* violations. To correct a *Giglio* violation, if proven, would simply require the State in this case to inform any subsequent jury that, in addition to other evidence they should weigh in evaluating Offie Evans' testimony, they should know that Evans was testifying in exchange for a promise. To correct a *Massiah* violation, by contrast, would require the State to present its case without any use at all of Offie Evans' testimony concerning Warren McCleskey's jailhouse "confession." To confound the likely harm to Warren McCleskey from these very different outcomes is a serious error.

The panel also appears to rely on the en banc's court's earlier assessment of Evans' testimony in light of the other evidence presented to the jury. (J.A. 131-132). Since that court did not itself consider the possible impact of the total exclusion of Evans' testimony on the State's case, and since the parties did not argue that question to the prior *en banc* court, any dicta by that court should have carried little weight with the subsequent panel, and none with this Court.

C. The Obligations of Rule 52(a)

The panel's holding neglected this Court's repeated teachings about Rule 52(a). In *Amadeo v. Zant*, for example, the Court observed that

> [a]lthough there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion . . . We frequently have emphasized that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' Anderson v. Bessemer City, 470 U.S. at 574, citing United States v. Yellow Cab. Co., 338 U.S. 338 (1949), and Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U. S. 844 (1982). We reaffirm that stricture today.

486 U.S. at 225-226. The panel simply did not heed that caution.

Furthermore, as it reweighed the evidence, the panel improperly discounted the potent evidentiary impact of Evans' testimony. It followed the reasoning of the prior en banc court (see note 44 *supra*), finding that the impact of the confession was harmless, in large part, because it was "not developed at length" during the trial testimony. (J.A. 134). Yet the relative brevity of Evans' testimony did nothing to minimize its force. Evans' account – stressing not only McCleskey's ostensible admission that he was the triggerman, but his boast that he would have killed a dozen officers had it been necessary – need have been not a word longer to have seared into the jury's collective memory. Justice White recently underscored the profound impact which accounts of a defendant's confession can have upon a jury:

> "[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may

> be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." [*Bruton v. United States*, 391 U S. 123], 139-40 [1968] (White, J. dissenting). Confessions of defendants have profound impact on juries, so much that we held in *Jackson v. Denno* . . . that there is justifiable doubt that juries will disregard them even if told to do so.

Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting).

The panel also reasoned that there was "no reasonable likelihood that the jury's *sentencing verdict*, its decision to impose a death sentence, had been affected by Evans' testimony, in part, because "[t]he prosecutor did not introduce Evans as a witness at the sentencing phase." (J.A. 134). Yet, as we have noted, Offie Evans was the penultimate witness to take the stand at the guilt phase, and neither party presented additional evidence at the sentencing phase. Thus, Offie Evans' testimony was fresh in the jury's mind when it began its deliberations, both at the guilt phase, and at penalty.

Evans' testimony, indeed, played a singular role. Other State's witnesses either had not seen the shooting, or, like Ben Wright and Mary Jenkins, possessed a strong motive to twist the truth. As this Court noted recently in *Satterwhite v. Texas*, 486 U.S. 249 (1988), the testimony of a singular, disinterested witness on a critical issue at the penalty phase of a capital trial is rarely, if ever, harmless error. Offie Evans played just such a role for the State in Warren McCleskey's case.

The District Court's factfindings on the harmless error issue should not have been ignored by the panel, and the District Court's conclusion – that the State has not proven that its *Massiah* violation was harmless beyond a reasonable doubt – should be reinstated by this Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JULIUS L. CHAMBERS, III
RICHARD H. BURR, III
GEORGE H. KENDALL
99 Hudson Street
New York, New York 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
New York, New York 10012
(212) 998-6198

* Attorney of Record

ROBERT H. STROUP
141 Walton Street
Atlanta, Georgia 30303
(404) 522-8500

*JOHN CHARLES BOGER
School of Law, CB# 3380
Van Hecke-Wettach Hall
Chapel Hill, North
Carolina 27599
(919) 962-8516

Attorneys for Petitioner
Warren McCleskey

BY: /s/ John Charles
Boger